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Nos. 95-779 and 95-259

In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER

DARLENE WALTERS, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

The prohibition against employment discrimination based on an individual's race, color, religion, sex, or national origin, set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, applies to any person who is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," 42 U.S.C. 2000e(b). The question presented is:

Whether an hourly paid employee who has an ongoing employment relationship with a person, as reflected by the employee's inclusion on the person's payroll, is counted as an employee of that person for purposes of Section 2000e(b) on days when the employee is not at work or on paid leave.

PARTIES TO THE PROCEEDINGS

The Equal Employment Opportunity Commission (EEOC) and Darlene Walters were appellants in the proceeding below. The EEOC is petitioner in *EEOC* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-779, and Darlene Walters is petitioner in *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259. The Court granted the petitions for a writ of certiorari in the two cases at the same time and consolidated the cases. 116 S. Ct. 1260 (1996).

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The opinion of the district court (95-259 Pet. App. 13a-19a) is reported at 864 F. Supp. 71.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. Petitioner Walters filed a petition for a writ of certiorari on August 14, 1995. *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259.

On October 10, 1995, Justice Stevens extended the time for petitioner the Equal Employment Opportunity Commission (EEOC) to file a petition for a writ of certiorari to and including November 15, 1995. The EEOC filed the petition for a writ of certiorari on November 15, 1995. On March 18, 1996, the Court granted the petitions for a writ of certiorari and consolidated the cases. 116 S. Ct. 1260. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service * * *, or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation * * *, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. 2000e(b).

Other pertinent provisions of Title VII, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Family and Medical Leave Act of

1993, 29 U.S.C. 2601 *et seq.*, are reprinted at 95-259 Pet. App. 20a-29a.

STATEMENT

1. Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan), sells and finances the sale of encyclopedias, dictionaries, and other educational materials to retail customers throughout the United States. J.A. 17. Darlene Walters, petitioner in *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259,[1] was employed as a payment collector by Metropolitan from January 3, 1986, through April, 1990. R. 12, at 2.[2] Walters filed a charge with petitioner Equal Employment Opportunity Commission (EEOC) in April, 1990, alleging that respondents had discriminated against her on account of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when they failed to promote her in September, 1989. See R. 12, at 2-3; J.A. 20-21.

Respondents received notice of Walters' discrimination claim in April, 1990. They discharged her shortly thereafter. R. 12, at 3-4. Walters alleges that she was discharged because she refused to comply with respondents' demand that she withdraw her discrimination claim. *Ibid.*

2. On April 7, 1993, petitioner EEOC filed suit against respondents Metropolitan and Leonard Bieber, the president and sole shareholder of Metropol-

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[1] Petitioner EEOC and Walters each petitioned the Court to grant a writ of certiorari to review the judgment of the court of appeals. The Court consolidated the cases when it granted the petitions. 116 S. Ct. 1260 (1996).

[2] "R. #" designates the number of the record document as listed on the district court docket sheet, and is followed, where appropriate, by the page number referenced in that document.

itan, in the United States District Court for the Northern District of Illinois, pursuant to its authority to enforce Title VII, as set forth in Section 706(f)(1) of the Act, 42 U.S.C. 2000e-5(f)(1). R. 1, at 2. The EEOC alleged that respondents had engaged in unlawful employment discrimination in violation of Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), in that respondents discharged Walters in retaliation for her having filed her sex discrimination charge with the EEOC. 95-259 Pet. App. 2a. Walters intervened as a plaintiff, alleging that respondents had discriminated against her on account of sex when they failed to promote her, in violation of Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), and had retaliated against her for having filed her discrimination charge, in violation of Title VII, 42 U.S.C. 2000e-3(a). Walters also made pendent state claims of retaliatory discharge and breach of contract. See R. 9; R. 12, at 2-5.

On August 13, 1993, respondents filed a motion to dismiss for lack of subject matter jurisdiction, claiming that Metropolitan was not an employer within the meaning of Title VII. That statute defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. 2000e(b); see 95-259 Pet. App. 2a; R. 25, 26. Respondents contended that Metropolitan, and its agent Bieber, had fewer than the threshold number of employees to trigger statutory coverage because employees who were paid on an hourly basis were to be counted only on days when they were either working or on paid leave. R. 26, at 3-4, citing *Norman* v. *Levy*, 767 F. Supp. 1441,

1449 (N.D. Ill. 1991). Respondents argued that, because respondent Bieber was the company's only non-hourly, salaried employee and there were not at least 14 hourly paid employees either at work or on paid leave for each working day in 20 calendar weeks in 1989 or 1990, Metropolitan was not an "employer" covered by Title VII. R. 26, at 4-5. Respondents submitted two affidavits and more than 50 charts in support of their motion. R. 25, 26.

Petitioners sought respondents' records and information regarding their methods of employee timekeeping. R. 31, at 2 & n.2; 95-259 Pet. App. 2a-3a. After months of discovery (limited by the court to the jurisdictional issue), petitioners determined that the time cards and redacted records produced by respondents did not include all the information relevant to determining the number of employees who were on paid leave for vacation, sick leave, or personal days on regular work days. R. 31. On March 4, 1994, Walters moved to compel further discovery. *Ibid.* The court granted the motion and respondents produced additional documents. Petitioners also conducted two depositions of respondents' witnesses relevant to calculating the number of employees. R. 22, at 1-3. The parties then engaged in discussions regarding appropriate stipulations and compilations of data from time cards, work diaries, registers, and other timekeeping records. The parties' stipulations were filed with the court on June 6, 1994. J.A. 17-79. These included 52 charts summarizing the daily attendance or leave status of each of respondents' employees for every day in calendar year 1990.[3]

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[3] Based on the EEOC's allegation of retaliatory discharge occurring in April, 1990, the relevant calendar years for pur-

The stipulated charts revealed that, during 1990, Metropolitan maintained on its payroll one salaried employee (respondent Bieber) and between 13 and 17 hourly paid employees, at least two of whom worked part-time schedules. J.A. 23, 28-79. The parties stipulated that two regular, part-time employees "did not work on each working day of each week in 1990, but they were each employed by [respondents] and on [respondents'] payroll during each week of calendar year 1990." J.A. 23. The parties also stipulated that, in 1990, Metropolitan had 15 or more employees on its payroll during 47 calendar weeks, but had 15 or more employees working or on paid leave on each working day in only nine calendar weeks. 95-259 Pet. App. 15a; J.A. 23-25.

Petitioners filed memoranda opposing respondents' motion to dismiss. R. 38, 39. Petitioner EEOC contended that the court should follow the approach adopted by most other courts and count the number of employees on respondents' payroll, rather than counting hourly paid workers only if they were at work or on paid leave on a particular day. R. 38, at 2. Peti-

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poses of Section 2000e(b) were 1990 and 1989. The parties agreed that, in 1989, respondents did not have 15 or more employees for the required length of time, regardless of the method used to count the number of employees. J.A. 26; see R. 38, at 3 n.3. The parties also stipulated that Metropolitan's sales force is comprised entirely of "dealer's representatives," with at least 20 such representatives working in 1989 and 1990. The dealer's representatives are not employees of Metropolitan, but work as independent contractors. See J.A. 17-19. They are therefore not included in employee counts for purposes of determining Title VII coverage. The parties stipulated that all other individuals employed by respondents during 1990 were employees for purposes of Section 701(f) of Title VII, 42 U.S.C. 2000e(f). J.A. 22-23.

tioners conceded that, under respondents' method of counting, the court would lack jurisdiction, *ibid.*; R. 39, and that respondents' position was supported by controlling circuit precedent, *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983). R. 38, at 2-3.[4] Petitioners urged the court to modify the method of counting adopted in *Zimmerman* and to adopt the payroll interpretation of Section 2000e(b) reached by other courts and supported by legislative history and principles of statutory construction. R. 38, at 8-12, citing, *inter alia*, EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (EEOC Policy Guidance) (*reprinted at* 95-259 Pet. App. 30a-40a), and 2A N. Singer, *Sutherland's Statutory Construction* § 46.07 (1984).

The district court granted respondents' motion to dismiss. 95-259 Pet. App. 13a-19a. The court concluded that it could not modify Seventh Circuit precedent, *id.* at 17a, and therefore applied the definition adopted in *Zimmerman*. It held that "hourly and part-time workers are considered employees * * * only on days when they are either physically present at work or on paid leave." *Id.* at 16a, citing *Zimmerman*, 704 F.2d at 353. In light of the parties' stipulation "that

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[4] In *Zimmerman*, the court of appeals applied respondents' interpretation to the essentially identical provision in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 630(b), which defines "employer" to mean "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. 630(b).

there were fifteen employees either present at work or on paid leave each day of the working week for only nine weeks of 1990," the court concluded that Metropolitan was not an "employer" covered by Title VII and dismissed petitioner's suit for lack of subject matter jurisdiction. *Id.* at 18a, 19a.

3. The court of appeals affirmed. 95-259 Pet. App. 1a-12a. The court endorsed the *Zimmerman* reading of Section 2000e(b) as necessary to give meaning to the words "for each working day." It believed that "the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week." 95-259 Pet. App. 6a. The court conceded that petitioners' alternative payroll interpretation gave meaning to those words as well, but dismissed that interpretation as "highly unlikely," because instances where employees begin or depart work mid-week are "unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *Ibid.* The court observed that "the statute could have been worded more clearly," but believed "that the *Zimmerman* court's interpretation of its plain text has stood the test of time and a new set of appellate eyes." *Ibid.*

The court of appeals recognized that Congress had recently used substantially similar language to define "employer" when it enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*[5]

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[5] The FMLA defines "employer" to mean

> any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

29 U.S.C. 2611(4)(A)(i).

It acknowledged that the Senate Report accompanying the FMLA "endorsed the payroll method over the *Zimmerman* alternative," but believed that had little consequence in this Title VII case. 95-259 Pet. App. 5a, 7a-9a. The court also acknowledged a circuit split regarding the correct meaning of Section 2000e(b).[6]

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[6] The First and Fifth Circuits and a number of district courts have adopted the EEOC's payroll method. See 95-259 Pet. App. 9a-10a & n.5, citing, *e.g.*, *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983), cert. denied, 466 U.S. 904 (1984); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980); *Reith* v. *Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993); *Cohen* v. *S.U.P.A. Inc.*, 814 F. Supp. 251, 254-256 (N.D.N.Y. 1993); *Vano* v. *Au*, Civ. A. No. 91-0038-H, 1992 WL 175498, at *2 (W.D. Va. July 16, 1992); *Gorman* v. *North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Evans* v. *Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984), aff'd, 769 F.2d 1012 (4th Cir. 1985); *Lynn* v. *JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick* v. *Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); *Pedreyra* v. *Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979). See also *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995); *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073, at *3-*5 (D. Kan. Oct. 31, 1994).

The Eighth Circuit and several district courts have followed *Zimmerman*. See 95-259 Pet. App. 10a & n.6, citing, *e.g.*, *EEOC* v. *Garden & Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992); *McGraw* v. *Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *Richardson* v. *Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994); *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (applying *Zimmerman* rule as binding precedent, but criticizing interpretation and "urg[ing] its reconsideration"); *Lord* v. *Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (adopting *Zimmerman* rule without citation to contrary binding First Circuit authority in *Thurber*); *Norman* v. *Levy*, 756 F. Supp.

The court adhered to the *Zimmerman* interpretation because it believed that Congress had not resolved the conflict in favor of either interpretation. 95-259 Pet. App. 8a-9a. The court recognized that the EEOC had rejected the *Zimmerman* method and had endorsed the payroll interpretation of Section 2000e(b), *id.* at 10a, citing EEOC Policy Guidance. It refused to defer to that interpretation because the EEOC policy guidance "was promulgated well after [the Seventh Circuit's] decision in *Zimmerman*," and because the "judiciary, not administrative agencies, is the final arbiter of statutory construction." *Ibid.*, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).[7]

In a concurring opinion, Judge Ripple observed that "the correctness of [*Zimmerman*] is not free from doubt," but concluded, "with some reluctance, that the EEOC has not made a sufficiently strong case to

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1060, 1063-1064 (N.D. Ill. 1990) (following *Zimmerman* as binding precedent); *EEOC* v. *Argent Industries, Inc.*, 746 F. Supp. 705, 708-709 (S.D. Ohio 1989); *Schoenbaum* v. *Orange County Center for Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D. Cal. 1987); see also *Hoekel* v. *Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir.), cert. denied, 115 S. Ct. 448 (1994); *Goudeau* v. *Dental Health Services, Inc.*, 901 F. Supp. 1139, 1143-1144 (M.D. La. 1995) (following *Zimmerman* notwithstanding Fifth Circuit dicta endorsing payroll method in *Dumas*).

[7] The court of appeals also rejected arguments that the *Zimmerman* method would eventually yield inconsistent interpretations of substantially similar statutory language, that it presents a greater opportunity for employers to evade statutory coverage by manipulating work schedules, and that it entails a burdensome coverage inquiry that could be avoided by adopting the EEOC's comparatively simple payroll method. 95-259 Pet. App. 11a.

warrant our overruling established [circuit] precedent of long standing." Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

Title VII's prohibition against employment discrimination based on an individual's race, color, religion, sex, or national origin, 42 U.S.C. 2000e *et seq.*, applies to any employer who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). This statutory language is correctly interpreted to include employers who have an employment relationship with the requisite number of employees for the relevant days, regardless of the daily work schedules of the individual employees. The Equal Employment Opportunity Commission (EEOC), the federal agency charged by Congress with primary administrative and enforcement responsibilities under Title VII, determines the number of employees that an employer has on a particular day by counting the number of employees on that employer's payroll for that day. The EEOC views "[t]he payroll [as] a reliable indicator of those individuals who have an employment relationship with the employer." 95-259 Pet. App. 39a. The text and structure of Title VII support this interpretation.

The purpose of Section 2000e(b) also supports the "payroll" method of determining whether an employer is covered. The coverage provision involved in this case was adopted to address concerns that Title VII not extend to employers of seasonal agricultural workers and small resort employers who employ a large number of employees for short periods of time each year. The legislative record makes clear that

the term "employer" otherwise should be given its ordinary meaning so that a person is considered to be the employer of all the employees with whom the person has an employment relationship at a particular time, regardless of the employees' individual work schedules.

To the extent that Title VII's coverage provision is ambiguous, the Court should defer to the interpretation adopted by the EEOC. The EEOC first adopted its payroll method for determining Title VII coverage in 1965—virtually contemporaneously with the initial enactment of Title VII. The EEOC applies the same interpretation to the essentially identical coverage provision in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b), a statute that expressly delegates to the EEOC the authority to issue interpretive regulations.

ARGUMENT

THE PROHIBITION AGAINST EMPLOYMENT DISCRIMINATION IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000e *ET SEQ.*, APPLIES TO AN EMPLOYER WHO HAS AN EMPLOYMENT RELATIONSHIP WITH 15 OR MORE EMPLOYEES, INDICATED BY THE INCLUSION OF THAT NUMBER OF EMPLOYEES ON THE EMPLOYER'S PAYROLL FOR EACH WORKING DAY IN 20 OR MORE WEEKS IN THE RELEVANT CALENDAR YEAR

A. The Text And Structure Of Title VII Support The Payroll Approach

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employers, employment agencies, and labor organizations from discriminating in employment decisions on the basis of race, color,

religion, sex, or national origin. 42 U.S.C. 2000e-2(a), (b), and (c). Congress defined "employer," for purposes of Title VII, to mean, in relevant part,

> a person engaged in an industry affecting commerce *who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year*, and any agent of such a person.

42 U.S.C. 2000e(b) (emphasis added).[8]

The verb "has," in the context of Section 2000e(b), is most naturally read to mean that the person engaged in commerce stands in an employment relationship with the employees. See *Webster's Third New International Dictionary* 1039 (1986) (def. 3(a): defining "have" to mean "to stand in any of several personal relationships to"; providing as examples: "as father to son, host to guest, friend to friend"); *The Random House Dictionary of the English Language* 877 (2d ed. 1987) (def. 7: defining "have" to mean to "be in a certain relation to"; providing as examples: "She has three cousins. He has a kind boss."). The number of employees an employer "has" at a particular time, for purposes of Title VII, is thus the number of

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[8] Congress defined "person," for purposes of Title VII, to

> includ[e] one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

42 U.S.C. 2000e(a).

Congress defined "employee," for purposes of Title VII, to mean "an individual employed by an employer." 42 U.S.C. 2000e(f).

employees who are in an employment relationship with the employer at that time.

In order to determine the number of employees that are in an employment relationship with an employer on a particular day for purposes of Section 2000e(b), petitioner Equal Employment Opportunity Commission (EEOC) counts the number of salaried and hourly paid employees on the employer's payroll for that day. The EEOC views "[t]he payroll [a]s a reliable indicator of those individuals who have an employment relationship with the employer." EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (EEOC Policy Guidance) (*reprinted at* 95-259 Pet. App. 30a-40a). The payroll method of identifying an employer's employees is completely consistent with both common sense and everyday usage.

Numerous lower federal courts have adopted that interpretation of Section 2000e(b). See note 6, *supra*. The First Circuit recognizes that an employee should be counted "for each day that an employment relationship exists." *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1983), cert. denied, 466 U.S. 904 (1984); see also *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995). The Fifth Circuit has applied the same approach. *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (1980), quoting B. Schlei & P. Grossman, *Employment Discrimination Law* 837-838 (1976) (to determine employer status under Title VII, "one looks to each of the 'working days' within the calendar weeks reviewed to see whether there were 15 or more individuals who were on the payroll regardless of whether they were actually

working full time or on any particular day"), and citing *Pascutoi* v. *Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cases (BNA) 1325 (D. Minn. 1975); see also *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073, at *4 (D. Kan. Oct. 31, 1994) (payroll method "is meant to recognize the existence of regular employer-employee relationships"); *Reith* v. *Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 895 (D. Kan. 1993) ("As long as the worker is regularly employed, and expected to return, the worker is subject to the effects of possible discrimination in the work place and should be counted as an employee."); *Lynn* v. *JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick* v. *Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); *Pedreyra* v. *Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (proper focus when counting employees is "nature of the relationship" of employees to the business "and not on the number of hours worked each day").

The payroll method reflects an interpretation of the "employer" coverage provision that is consistent with the general rule of construction for civil rights statutes. Such statutes are remedial in nature and should be construed broadly to effectuate the statutory purpose. See *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d at 635 ("[T]he prevailing majority in Congress intended to give [Title VII] broad effect."), citing 110 Cong. Rec. 13,087-13,093 (1964) (comments of Senators Morse, Saltonstall, and others); see also *Virgo* v. *Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994) (consistent with purposes of Title VII, term "employer" should be interpreted liberally); *Trevino* v. *Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983) (same); *Owens* v. *Rush*, 636 F.2d 283, 287 (10th

Cir. 1980) (to effectuate statute's humanitarian policies, liberal construction is generally given "employer" definition under Title VII); *Baker* v. *Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977) (same).

Interpreting Section 2000e(b) to cover employers that have 15 or more employees on their payroll for the relevant number of days, regardless of the individual employees' particular payment status (hourly paid versus salaried) or work schedules, best furthers the purpose of Title VII. Title VII was enacted to remedy the long history of employment discrimination against African Americans and women. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 16-18 (1963); 110 Cong. Rec. 2577-2584, 2718-2721 (1964). The payroll interpretation furthers that purpose by counting all employees equally based on the existence of an employment relationship, without distinctions based on payment status. The court of appeals' interpretation, on the other hand, excludes from the employment count hourly paid employees (but not salaried employees) for days on which they do not work (and are not on paid leave). See pages 17-19, *infra*. Excluding hourly paid employees from the employee count disproportionately excludes women and black employees. Data from the Current Population Survey of the Bureau of Labor Statistics, U.S. Dep't of Labor, show that of the wage and salary workers in the United States in 1995, 62.1% of the total workers were paid hourly. Of the female workers, 64.8% were paid hourly, whereas 59.7% of the male workers were paid hourly. Of the black workers, 70.8% were paid hourly, whereas 60.9% of the white workers were paid hourly. The court of appeals' interpretation therefore would disproportionately

exclude from Title VII's coverage employers who employ substantial numbers of the employees whom Title VII was primarily designed to protect.

2. The court of appeals interpreted Section 2000e(b) to require that hourly paid employees be excluded from the employee count "on days when they were neither working nor on paid leave." 95-259 Pet. App. 4a, 5a-6a, citing *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347, 353-354 (7th Cir. 1983). That interpretation categorically excludes hourly paid employees from the employee count under Section 2000e(b) in at least four circumstances: when an hourly paid employee takes leave without pay for a particular day; when an hourly paid, part-time employee does not work a particular day;[9] when an hourly paid, full-time employee has a flex-time or compressed schedule that permits the employee to work longer hours on certain days and not work on a particular day;[10] and when an hourly paid employee

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[9] As noted in our petition (at 21), there were between 22 and 24 million part-time employees in the United States in 1994. Approximately 65 percent of those part-time employees were women. See Bureau of Labor Statistics, U.S. Dep't of Labor, 42 Employment and Earnings, No. 1, at 21 (Jan. 1995).

[10] "The number of full-time wage and salary workers with flexible work schedules was 12.1 million in May 1991, up from 9.1 million in 1985," increasing the proportion of full-time workers with flexible schedules to 15.1 percent in 1991. See Bureau of Labor Statistics, U.S. Dep't of Labor, News Release No. 92-491, at 1 (Aug. 14, 1992).

Flex-time and compressed schedules vary widely. One common type is a compressed schedule under which a full-time employee works ten hours for each of four work days and does not work on the fifth day. Another common schedule is for a full-time employee to work nine hours for each of eight days out of a two-week (ten-day) payroll period, to work the regular

has a work schedule that requires work on more than five days in a row, followed by a day off on a work day.[11]

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eight hours on the ninth day, and to not work at all on the tenth day. Under the court of appeals' interpretation, hourly paid employees on such compressed schedules would not be counted under Section 2000e(b) on the day they did not work, despite the fact that they are regular, full-time employees.

In 1982, Congress enacted the Federal Employees Flexible and Compressed Work Schedules Act, in which it found that "the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater service to the public." Pub. L. No. 97-221, § 2(a)(2), 96 Stat. 227, codified at 5 U.S.C. 6120. Section 6122 of Title 5 authorizes federal agencies to establish programs that allow the use of flex-time schedules.

In 1993, as part of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, Congress provided that eligible employees are entitled to leave for certain medical reasons, the birth or adoption of a child, or the care of an immediate relative. 29 U.S.C. 2601(b), 2612(a). Such leave may be paid or unpaid, depending on the circumstances. See 29 U.S.C. 2612(c) and (d). Such leave may, in some instances, include a "reduced leave schedule," which means a leave schedule that reduces the usual number of hours per workweek, or hours per workday. See 29 U.S.C. 2611(9), 2612(b). Under the court of appeals' interpretation, whether such employees would be counted for purposes of Title VII coverage would vary depending on the employees' pay status (hourly or salaried) and work schedule.

[11] The court of appeals' interpretation would, at the same time, count for a particular day any employee, even an hourly paid, part-time employee, who works at least part of that day. Thus, under the court of appeals' approach, some hourly paid employees who work 40 or more hours per week are counted on fewer than all the days of the week because of the days they work, but some part-time employees who work as few as five hours per week are counted on every day so long as they work an hour, or perhaps less, each day.

There is no support in the statutory text for treating hourly paid employees differently from salaried employees in this respect.[12] The court of appeals' interpretation appears to be based on the premise that whether an employer-employee relationship exists on a particular day depends on whether the employer pays wages to that employee on that day. It thus counts salaried employees on all days, regardless of whether they actually work, because the employer is paying them compensation during that period of time. It does not count an hourly paid employee except on days the employee works or is on paid vacation—*i.e.*, days for which the employer pays the employee wages. Under that approach, an hourly paid worker is not considered an employee on his or her regular or occasional days off.

That interpretation is inconsistent with the established meaning of the employment relationship,[13]

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[12] Under the court of appeals' approach, a salaried employee is counted under Title VII on each day of the week, regardless of whether he or she is on a regular full-time, flex-time, or part-time schedule.

[13] The Court "ha[s] said on several occasions that when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m]. . . . In the past, when Congress has used the term "employee" without defining it, [the Court has] concluded that Congress intended to describe the conventional master-servant relationship understood by common-law agency doctrine.'" *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 455 (1995) (citations omitted). The Court has explained:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by

according to which employees do not cease to be employees on their day off from work. Cf. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) ("employees of the Employer's plant * * * who work on hourly rates of pay" may include "persons on temporary or limited absence from work, such as employees on military duty"). Generally, nonfinancial compensation such as health insurance and seniority rights continue for both salaried and hourly paid workers on their days off, regardless of whether they are on paid leave. Cf. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-143 (1977) (policy that deprived pregnant employees on unpaid leave of accumulated seniority "acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as an employee'"). Everyday experience evidences that various employment benefits continue to be provided to hourly paid employees on their days off; indeed, some are specifically designed to be enjoyed when an employee is not working, *e.g.*, health club memberships,

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which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Nationwide Mutual Ins. Co. v. *Darden*, 503 U.S. 318, 323-324 (1992), quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751-752 (1989).

employee discounts, employee holiday parties, and employee picnics. Moreover, in employment relationships where the employer's control includes precluding his or her employee from working for a competitor during the course of his or her employment, the employer and employee clearly understand that their employment relationship continues even on the employee's days off without pay. Hourly paid employees also often remain under the control of their employers on their days off to the extent that the employee must be available to work a shift if a co-worker scheduled to work calls in sick.[14]

The court of appeals' interpretation is also contrary to ordinary usage and common sense. An employment relationship is not interrupted when an hourly paid employee has a day off without pay. When it is said that an hourly paid employee "has" a certain employer, or an employer "has" a certain person as his or her employee, the common understanding is that the two people are involved in a continuing employment relationship. Such a relationship clearly continues during an hourly paid worker's regular day off, so long as the expectation is that the employee will report to work on his or her next assigned day. For example, if one

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[14] In *Zimmerman*, the court of appeals stated that it did not reach, and it expressed no opinion about, "the method of counting hourly paid workers on paid leave, the method of counting hourly paid workers on non-paid standby status, and the method of counting salaried workers." 704 F.2d at 354 n.6. The court of appeals in the instant case, however, made clear that its method counts employees in the first and third categories, and the rationale underlying the opinion necessarily would exclude employees in the second category—hourly paid workers on non-paid standby status.

of an employer's 20 employees works according to a flex-time or compressed schedule and has one day off every other week, everyone would agree that the employer still has 20 employees for the entire two weeks.

The court of appeals indicated that it adopted its interpretation of Section 2000e(b) to give meaning to the words "for each working day." It believed that "the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week." 95-259 Pet. App. 6a. Section 2000e(b), however, does not "contain any limitation indicating that only those individuals actually at the work site on each working day are to be considered employees under Title VII." EEOC Policy Guidance, *reprinted at* 95-259 Pet. App. 36a-37a. Moreover, the EEOC's interpretation also gives meaning to the phrase "for each working day." "Because workers might join or leave a firm midweek, the clause * * * meaningfully modif[ies] the language that follows: 'in each of twenty or more calendar weeks.'" See Recent Case, 109 Harv. L. Rev. 675, 679 (1996); pages 32-33, *infra* (Senate Report accompanying FMLA interprets substantially similar statutory language in this manner, believing that it gives meaning to "for each working day").[15]

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[15] The statutory phrase "for each working day" is part of the initial clause of Section 2000e(b), which specifies the minimum number of employees required for statutory coverage after Title VII has become effective. That language was not included in the clauses of Section 2000e(b) that specified the threshold number of employees required for statutory coverage during the several years of the phase-in period, *i.e.*, the years immediately following enactment and amendment of

B. The Legislative History Also Supports The Payroll Approach

1. An earlier version of the bill, H.R. 7152, 88th Cong., 1st Sess. (1963), that eventually became the Civil Rights Act of 1964, defined "employer," in relevant part, to mean "a person engaged in an

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Section 2000e(b) during which Title VII was not yet at full strength.

As initially enacted, Title VII defined an employer as a person "who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," but further specified that, "during the first year after the effective date * * *, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers." Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253-254. When Section 2000e(b) was amended in 1972 to lower the statutory threshold number of employees to 15, the limiting provision was also amended to delay the effective date of the amendment a year by stating that, "during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

Under the court of appeals' approach, the definition of "employer" during the phase-in years would be given a different meaning from that applicable after the phase-in periods were completed because of the omission of the "for each working day" language in the phase-in provisions. That would be an unusual result. All of the clauses defining employers serve the same function of establishing the number of employees that triggers Title VII coverage. The absence of the phrase "for each working day" in the clauses governing the phase-in years constitutes additional evidence favoring the EEOC's construction.

industry affecting commerce who has twenty-five or more employees, and any agent of such a person."[16] Throughout the hearings and floor debates in the House of Representatives on the legislation, both supporters and opponents interpreted that language according to its ordinary usage; it was thus understood to include all employees on an employer's payroll, regardless of their particular work schedules. See, *e.g.*, 110 Cong. Rec. 1620 (1964) (remarks of Rep. Abernethy) (opposing Title VII because it would permit government to object to hiring practices by a store that "employed as many as 25 persons full or part time"); H.R. Rep. No. 914, 88th Cong., 1st Sess. 109 (1963) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer) (criticizing Title VII because it would cover any retail service, trade and professional establishment "which employs 25 or more full- or part-time employees"); *id.* at 72 (Minority Report on proposed substitute bill) (posing rhetorical questions about obligations imposed by Title VII regarding "a nonunion individual * * * employed by a corporation which has more than 25 people on its payroll (title VII)"); *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 457 (1964) (same).[17]

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[16] This definition was contained in the version of H.R. 7152 that was reported out of the Committee on the Judiciary of the House of Representatives, debated and amended on the floor of the House, passed by the House and then referred to the Senate. See 110 Cong. Rec. 12,811-12,812 (1964).

[17] The only relevant amendment made on the floor of the House to the employer definition in the bill that had been reported by the Judiciary Committee changed the length of time over which the coverage was to be phased in. See note 15, *supra*. The reported bill had a phase-in period of four years

When H.R. 7152 was referred to the Senate, there were several efforts, during floor debates, to amend the definition of "employer" in Title VII. The circumstances surrounding the adoption of one of those amendments, and the rejection of another, are instructive.[18]

(no employers covered in first year after enactment; employers with 100 or more employees covered in the second year; employers with 50 or more employees covered in the third year; employers with 25 or more employees covered thereafter). The floor amendment changed this to a phase-in period of five years (adding an intermediate step whereby only employers with 75 employees or more are covered during the third year). See 110 Cong. Rec. 2716-2717 (1964).

In 1972, Congress amended the definition to lower to 15 the threshold number of employees for Title VII coverage. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103. The new jurisdictional requirement did not apply during "the first year after the date" of the enactment of the 1972 amendments.

[18] Although the court of appeals viewed the legislative history of Title VII as "too confused and chaotic to be of much use," 95-259 Pet. App. 5a n.3, the legislative history of Section 2000e(b) is, in fact, quite illuminating. The principal obstacle to its use is the fact that it is contained within the extremely lengthy legislative history of the Civil Rights Act of 1964. It is especially appropriate, however, to look to the legislative history of Section 2000e(b) in this case because the statutory language in question was discussed and added to the legislation, not by a subcommittee or during a committee hearing, but by the primary author of the version of the bill that was enacted into law (Senator Dirksen) during debates on the floor of the Senate that received an extraordinarily high level of attention from members of that body, and which involved roll call votes with 95% or more of the members of the Senate voting. The court of appeals acknowledged that "certain remarks of Senator Dirksen are consistent with [petitioners'] arguments." 95-259 Pet. App. 5a n.3.

The most relevant amendment by the Senate added the language "for each working day for twenty or more calendar weeks in the current or preceding calendar year." The amendment arose out of concerns expressed by Senator Dirksen early in the debates. He noted that the bill "merely provide[d] that an employer would have 100 employees; then the number would drop to 75, then to 50, and then to 25." 110 Cong. Rec. 6450 (1964). He argued that the definition was not specific enough to resolve some questions concerning coverage of employers, such as employers of seasonal agricultural workers and resort employers, who employ a large number of employees for short periods of time each year. See *ibid.*[19]

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[19] Senator Dirksen considered "the operation of a medium-sized orchard. For 11 1/2 months of the year the employer would have no employees, but during 2 weeks of the year he would employ 100 pickers." 110 Cong. Rec. 6450 (1964). Senator Dirksen inquired whether that employer would be subject to the provisions of Title VII. He also inquired about "summer or winter resort operations with employment for only 2 or 3 months, at the most." *Ibid.* Senator Dirksen noted that the Illinois fair employment practice law provided a more specific definition that would have answered these questions more clearly than did the then-pending H.R. 7152. *Ibid.*

A member of the House had raised a similar concern about seasonal workers, but had been unsuccessful in obtaining an exemption. See 110 Cong. Rec. 2728-2729 (1964) (remarks of Rep. Rogers) (introducing unsuccessful amendment exempting from Title VII certain agricultural employers, including those who employ more than the statutory number of employees for short periods of time); *id.* at 2708-2715 (noting problem of "little farmers who are forced, because of the seasonal situation in agriculture, to hire 35 or 40 people for a couple of weeks during the year and hence fall under this act").

Senator Clark responded directly to Senator Dirksen's concerns, explaining that "[t]he term 'employer' [was] intended to have its common dictionary meaning, except as expressly qualified by the act." 110 Cong. Rec. 7216 (1964). Regarding seasonal employees, Senator Clark stated that, under the House-passed version of H.R. 7152, "[e]mployers whose staffs fluctuate seasonally are covered by the act at times when the number of employees exceeds the minimum figure; they are not covered when it is below the minimum." *Id.* at 7216-7217. That interpretation did not satisfy Senator Dirksen's concerns, apparently because it would result in some employers being covered by Title VII for some parts of a year but not for other parts of the same year.

In the Dirksen-Mansfield substitute bill which became the version of H.R. 7152 passed by the Senate (as amended on the floor in other respects), the definition of "employer" was amended to add the language "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[20] Senators Humphrey and Dirksen

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[20] The Dirksen-Mansfield amendment initially was introduced as amendment No. 656, in the nature of a substitute for H.R. 7152. See 110 Cong. Rec. 12,704-12,705, 12,721-12,725, 12,807-12,820 (1964). After amendment No. 656 was amended in accordance with proposals that arose during floor debates, a new version was submitted as amendment No. 1052, in the nature of a substitute for amendment No. 656 and for H.R. 7152. *Id.* at 13,310-13,319. The Senate agreed to amendment No. 1052 as a substitute for amendment No. 656 and for H.R. 7152, *id.* at 14,237-14,239, and ultimately passed that version of H.R. 7152, *id.* at 14,511. An annotated copy of H.R. 7152, reflecting the relevant changes made by the Dirksen-Mansfield substitute amendment appears at 110 Cong. Rec. 12,807-12,817 (1964).

described the changes made by the substitute bill. Senator Humphrey explained that "the definition of 'employer' has been clarified to provide needed certainty as to coverage of employers where the number of employees fluctuates above and below the figure requisite to application of the title. Coverage is limited to those employers who employ more than the required minimum number of employees for at least 20 weeks out of the year." 110 Cong. Rec. 12,722 (1964). Senator Dirksen explained that the "[d]efinition of 'employer' [was] amended to provide a specific test for computing the number of employees of an employer, in determining whether the employer is covered by the bill." *Id.* at 12,818; see also *id.* at 14,331 (remarks of Sen. Williams) ("The Senate amendment * * * defined an employer as one who has 100 employees during the first year of operation of the law, 75 during the second, 50 the third, and 25 thereafter, for each working day in each of 20 or more calendar weeks in the current or preceding year. This exemption for seasonal industries was not included in the House bill.").

The other debate that sheds light on the correct interpretation of the definition of "employer" in Title VII concerned the Cotton amendment—an unsuccessful effort to amend Title VII so that its coverage was limited "permanently * * * to establishments with 100 or more employees." 110 Cong. Rec. 13,085 (1964) (remarks of Sen. Cotton). Senator Dirksen urged (successfully) the rejection of the Cotton amendment, explaining the background of his earlier amendment of the definition of "employer":

> We have spent several months now in an exhaustive effort * * * for the purposes of

making this as practical and workable as a title of this kind could be.

Accordingly, the House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to 25 or more who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year. We went through that matter with the Department of Labor and others, in order to make sure that we were on good ground.

* * * * *

* * * I believe we have taken what is perhaps a sensible figure on the bill, and then nailed it down to make a proper exception for seasonal employees.

Id. at 13,087-13,088.

At that time, the federal statute defining "employer" for purposes of unemployment compensation contributions, to which Senator Dirksen referred, provided that an employer was not covered by the statute "unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more." 26 U.S.C. 3306(a) (1958). For purposes of that "employer" definition, all employees were counted on a particular day, including part-time employees, so long as they had an employment relationship with the em-

ployer on that day, regardless of whether the employees performed physical service for the employer that day. See Rev. Rul. 55-19, 1955-1 C.B. 496-499, *reprinted at* J.A. 80-85.[21]

That ruling was based on the IRS's conclusion that

> the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week.

J.A. 81. The ruling also explains that the basis on which compensation is paid does not determine whether there is an employer-employee relationship on a particular day. J.A. 83-84. An employer-employee relationship continues to exist on days when an employee is absent from work, regardless of the method or frequency of compensation paid or the employee's status as a part-time employee, so long as

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[21] Revenue Ruling 55-19 addressed inquires that the Internal Revenue Service had "received regarding the method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under section 1607(a) of the Federal Unemployment Tax Act (subchapter C, chapter 9, Internal Revenue Code of 1939 [26 U.S.C. 1607 (1952]) under certain conditions, particularly where part-time employees are involved." J.A. 80. When Congress enacted the Internal Revenue Code of 1954, it recodified Section 1607(a) at 26 U.S.C. 3306(a). See Internal Revenue Code of 1954, ch. 736, § 3306(a), 68A Stat. 447. The only difference between Section 1607(a), as interpreted in Revenue Ruling 55-19, and Section 3306(a), as in effect in 1964 (*i.e.*, 26 U.S.C. 3306(a) (1958)), was that the required number of employees had been decreased from eight to four. See Act of Sept. 1, 1954, ch. 1212, § 1, 68 Stat. 1130.

the parties intend for the employee to continue to work for the employer on specific days in the future such that the relationship has not been definitely terminated. J.A. 81-85. This ruling was the settled administrative interpretation of the unemployment compensation "employer" coverage provision in 1964, when the Senate amended the Title VII "employer" definition in the Dirksen-Mansfield substitute bill.

The Cotton amendment was rejected in favor of retaining the Dirksen-Mansfield definition. 110 Cong. Rec. 13,093 (1964).[22] The Senate adopted the Dirksen-Mansfield substitute amendment on June 17, 1965, *id.* at 14,237-14,239, and passed H.R. 7152 as amended on June 19, 1964, *id.* at 14,511. See note 20, *supra*. The House voted to accept the Senate substitute without change on July 2, 1964, *id.* at 15,869-15,897, 15,981, and the President signed the Civil Rights Act into law that same day. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

The legislative record of the enactment of Section 2000e(b) thus fully supports the interpretation given it by the EEOC. There is nothing in that record to indicate that Congress meant to exempt from coverage, as the court of appeals would, an employer who has an employment relationship with the required number of employees for the requisite number of days and weeks (as evidenced by payroll records), because

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[22] Senator Humphrey also had argued against the Cotton amendment by defending the Dirksen-Mansfield substitute's definition of "employer" and explaining its purpose and rationale: when the number of an employer's employees gets "above 25, they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services. They also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13,088 (1964).

some hourly paid employees do not report to work on particular days. See *Thurber*, 717 F.2d at 634 ("legislative history generally weighs heavily against the [employer-defendant's] position"); *id.* at 635 ("there is nothing in the record to indicate a Congressional intent to require that employees report to work on each day that they are included" in the coverage determination). Senator Dirksen's statement that the coverage provision in Title VII was based on the federal unemployment compensation coverage provision reaffirms the logic of the EEOC's interpretation of Section 2000e(b). Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). The court of appeals erred in discounting the historical support for a broad interpretation of Title VII's coverage provision, and in adopting a narrow construction that restricts coverage contrary to expressed congressional intent.

2. Recent legislative action also confirms the soundness of the payroll method of interpreting Title VII's coverage provision. In 1993, Congress enacted the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.*, to promote the stability and economic security of families by entitling employees "to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition," while accommodating the legitimate interests of employers. 29 U.S.C. 2601(b)(1), (2) and (3). See note 10, *supra*. Congress used language substantially similar to that in Section 2000e(b) to define those "employers" covered by the FMLA. 29 U.S.C. 2611(4)(A)(i) (set forth in note 5, *supra*).

The Senate Report that accompanied the FMLA stated that the definition of "employer"

> *parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation.* As most courts and the EEOC have interpreted this language, "[e]mploys * * * employees for each working day" is intended to mean "employ" in the sense of *maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose.* * * * *[P]art-time employees and employees on leaves of absence would be counted as "employed for each working day" so long as they are on the employer's payroll for each day of the workweek.* On the other hand, an employee who begins employment, i.e., is added to the employer's payroll, after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on "each working day" of such week.

S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993) (emphasis added). While the FMLA Senate Report cannot serve to establish the intent of Congress at the time it enacted Title VII in 1964, see *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 168 (1989), it clearly demonstrates the reasonableness of the EEOC's payroll interpretation of Section 2000e(b). Indeed, that is the interpretation the Court should adopt. As the Court has recognized, its role is to construe a statute, where the text permits, "to contain that permissible meaning which fits most logically and comfortably into the body of

both previously and subsequently enacted law." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991).

C. Principles Of Administrative Deference Require Application Of The EEOC's Interpretation Of Section 2000e(b)

The court of appeals' interpretation of Section 2000e(b) was based on "a reading of the statute's plain text." 95-259 Pet. App. 6a. As shown above, however, the EEOC's payroll method is at least as consistent with the text of the statute and much more consistent with Title VII's overall structure, purpose, and history. Moreover, the court of appeals itself acknowledged that "the statute could have been worded more clearly," and that the " 'for each working day' language [is] problematic." *Id.* at 6a, 9a. To the extent that Section 2000e(b) is ambiguous, the EEOC's interpretation requires deference.

The EEOC is the federal agency charged with primary responsibility for administering and enforcing Title VII. The agency bears the responsibility for investigating all Title VII charges of discrimination before complainants can seek relief in court. 42 U.S.C. 2000e-5(b). If the EEOC determines, after such investigation, that reasonable cause exists to believe that the charge is true, it must attempt to eliminate the discriminatory practice through informal conciliation. *Ibid.* It is only after these two administrative stages that a case can proceed to federal court; in cases involving private employers, that action can be brought either by the EEOC or by

the charging party. 42 U.S.C. 2000e-5(f).[23] The EEOC's responsibilities for enforcing Title VII also include administering certain recordkeeping requirements. See 42 U.S.C. 2000e-8.

The EEOC's authority to issue regulations under Title VII is limited to procedural regulations. 42 U.S.C. 2000e-12(a).[24] The agency is, however,

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[23] Civil actions against state and local governments are handled by the Attorney General. See 42 U.S.C. 2000e-5(f)(1).

[24] The EEOC is also charged with primary responsibility for administering and enforcing some other antidiscrimination statutes, including the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 630(b). The EEOC's interpretation of Title VII's definition of "employer" is the same interpretation that the EEOC has adopted for purposes of the coverage provision in the ADEA, 29 U.S.C. 630(b) (set forth in note 4, *supra* (using same relevant language as in Section 2000e(b) to define "employer," except that number of employees required is 20 or more)). See EEOC Policy Guidance, *reprinted at* 95-259 Pet. App. 30a-40a. Under the ADEA, the EEOC has explicit statutory authority to issue regulations "necessary or appropriate for carrying out [the ADEA]." 29 U.S.C. 628.

The EEOC also has indicated that the same interpretation of "employer" applies to the essentially identical coverage provision in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111(5)(A). See 29 C.F.R. Pt. 1630, App. ("[T]he title VII definitions of the entities included in the term 'covered entity' (*e.g.* employer, employment agency, *etc.*) are applicable to the ADA."). Under the ADA, the EEOC has explicit statutory authority to issue regulations "to carry out [the ADA]." 42 U.S.C. 12116.

The EEOC's construction of Section 2000e(b) is consistent with regulations issued by the Department of Labor interpreting the "employer" coverage provision of the FMLA, 29 U.S.C. 2611(4)(A)(i) (set forth in note 5, *supra* (using language substantially similar to the language used in Section 2000e(b), except that number of employees required is 50 or more)). See 29 C.F.R. 825.104(a), 825.105(b)-(e), *reprinted at* 95-259 Pet.

expressly given authority to provide legal interpretations and opinions of Title VII to individuals, for whom they have legal effect. Under Section 713 of Title VII,

> [i]n any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of * * * the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, *in conformity with, and in reliance on any written interpretation or opinion of the Commission* * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

42 U.S.C. 2000e-12(b) (emphasis added). It is clear, therefore, that Congress intended that the EEOC make determinations of employer coverage, necessitating interpretation and application of Section 2000e(b) on a daily basis and in individual cases.

The EEOC's interpretation of Section 2000e(b) to count all the employees on the payroll, regardless of their work schedules, dates back to the years immediately following enactment of Title VII. In 1966, the EEOC published the *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* (1966) (*Digest*), which included EEOC

Supp. Br. App. 1a-2a. Under the FMLA, the Department of Labor has explicit statutory authority to issue regulations "as are necessary to carry out [the FMLA]." 29 U.S.C. 2654.

interpretations of Title VII dating from July 2, 1965, through July 1, 1966. The majority of these interpretations "were made in response to letters of inquiry addressed to the Commission by interested members of the public; the remainder were generated by questions posed by the Commissioners or members of the staff." *Digest* i. The *Digest* included the following interpretation of Section 2000e(b):

> The term "employees for each working day" as used in Sec. 701(b) [2000e(b)] refers to persons on the payroll and regularly employed, not to the number of persons at work on any given day. Thus, if an enterprise operates 7 days a week, but no employee works more than 5 days a week, the number of employees is the number who work regularly for any part of the 7-day week.

Digest 2, citing a May 11, 1966, General Counsel opinion. Also, in *Pascutoi* v. *Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975), the court relied on two opinions by the EEOC General Counsel dated October 18 and 20, 1966. The court explained that the opinions "state[d] that the crucial test is how many employees are on the payroll during the crucial 20-week periods and not how many are at work on a given day." *Id.* at 1326.

As a virtually contemporaneous and long-standing agency interpretation of the statutory term, the EEOC's interpretation is entitled to particular deference. See *Brown* v. *Gardner*, 115 S. Ct. 552, 557 (1994), citing *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); see also *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142-143 (1976); *Satty*, 434 U.S.

at 142 n.4.[25] And, in 1990, the EEOC affirmed its early interpretation in a detailed policy guidance based upon a thorough review of the conflicting case law, 95-259 Pet. App. 32a-34a, the relevant legislative history, *id.* at 34a-35a, and general principles of statutory construction, *id.* at 36a-38a. The EEOC noted that the *Zimmerman* counting method would permit employers to "manipulate work schedules to avoid coverage under Title VII." *Id.* at 38a, citing *Gorman* v. *North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) ("Under [the *Zimmerman*] construction, a business that operates almost entirely with part-time labor could escape the prohibitions of the [Act], despite the number of workers.").[26] The EEOC also observed that

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[25] The Seventh Circuit was aware of the EEOC's early interpretation of Section 2000e(b). In *Zimmerman*, the court of appeals identified the decision in *Pascutoi*, 11 Fair Empl. Prac. Cas. (BNA) at 1326-1327, as "a case which seems factually on point" but with a result contrary to its own. 704 F.2d at 353. The *Pascutoi* court relied on the EEOC General Counsel opinions and the Seventh Circuit expressly noted that the court in *Pascutoi* "held that the crucial question is how many employees were on the payroll during the week, not how many were at work on a given day." *Ibid.*; see *Pascutoi*, 11 Fair Empl. Prac. Cas. (BNA) at 1326. The EEOC cited *Pascutoi* in support of its position in this case as well. R. 38, at 6.

[26] See also *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073, at *4 (D. Kan. Oct. 31, 1994) (*Zimmerman* approach "encourages businesses to manipulate the schedules of part-time workers to escape the prohibitions of Title VII"); *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) ("The approach taken in *Zimmerman* affords an employer the opportunity to circumvent the proscriptions of the ADEA and of Title VII, thereby denying the protection of those statutes" to a substantial number of employees.).

"proof under the *Zimmerman* approach would be difficult for plaintiffs to obtain. Even assuming that an employer kept and maintained time cards and leave records, it would be an extremely tedious task to determine how many employees reported to work each day during the two-year period provided for by the statute." *Id.* at 39a.[27] The comparative simplicity of the payroll method constitutes a benefit for the EEOC and a significant number of employees, job applicants, and relatively small employers. Cf. *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318, 327 (1992) (rejecting definition of employee for purposes of Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(6), in part because it would "severely compromise the capacity of companies * * * to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be").

The EEOC's interpretation "is based on a permissible construction of the statute," and reflects "a reasonable policy choice for the agency to make." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984). The thor-

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[27] The fact that the court of appeals' approach requires additional recordkeeping is inconsistent with one of the main concerns expressed during the congressional debates regarding enactment of Title VII. Members of Congress emphasized that they did not intend to impose burdensome new recordkeeping requirements on employers. See, *e.g.*, 110 Cong. Rec. 2708-2715 (1964) (remarks of Rep. Smith); *id.* at 7214 (remarks of Senators Clark and Case) (discussing fact that "[m]ost of the persons covered by the title are already required by law or by practical necessity to keep records similar to those which will be required under this title," and that recordkeeping requirements imposed under Title VII could be "worked into existing requirements and practices so as to result in a minimum [of] additional burden").

oughness of the agency's consideration of the issue, the validity of its reasoning, and the persuasive nature of its interpretation warrant its adoption by the Court. *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991). The fact that the interpretive issue in question is one that Congress clearly intended the agency to address on a daily basis, in light of its statutory responsibilities, underscores the weight appropriately to be given the agency's view. Cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) ("body of experience and informed judgment to which courts and litigants may properly resort for guidance").

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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